Office-Supreme Court, U.S.
FILED
JUL 11 1985
ALEXANDER L. STEVAS,
CLERK

(6)

No. 84-1485

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN MORAN, RHODE ISLAND DEPARTMENT OF CORRECTIONS, PETITIONER

v.

BRIAN K. BURBINE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

CHARLES FRIED
Acting Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

ANDREW J. PINCUS
Assistant to the Solicitor General

SARA CRISCITELLI
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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36 pp

QUESTION PRESENTED

Whether respondent's three voluntary confessions, each of which was preceded by a written waiver of the rights enumerated in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), must be excluded from evidence because the police did not inform respondent that an attorney—whom respondent did not request—had telephoned the police station and volunteered to act as respondent's counsel.

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INTEREST OF THE UNITED STATES

The issue in this case is whether respondent's knowing and voluntary waivers of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), were invalid because the police did not inform respondent that an attorney had telephoned the police station and volunteered to represent respondent if he was interrogated by the police. This Court's analysis and resolution of the question whether a suspect's waiver of his *Miranda* rights is vitiated by the police's failure to provide such information is likely to have an effect upon the conduct of interrogations by federal law enforcement officers and the admission of voluntary statements in federal criminal prosecutions.

STATEMENT

1. On June 29, 1977, respondent and two associates were arrested in Cranston, Rhode Island, on a charge of breaking and entering. The police officers obtained respondent's address and found that it matched the address of the person who, according to an informant, was responsible for a murder committed three months earlier in Providence, Rhode Island. The officers also learned that respondent's nickname was identical to the nickname supplied by the informant. Respondent was read the *Miranda* warnings but he refused to sign a waiver form. The officers obtained statements from respondent's associates implicating respondent in the Providence killing. They then telephoned the Providence police and invited them to the Cranston police station to interrogate respondent. Pet. App. 2-3, 48-49; Supp. Tr. 147-150, 171.[1]

Several hours later, respondent's sister telephoned the Office of the Public Defender to obtain legal assistance for respondent and left a message for the attorney who was representing respondent on an unrelated charge. The Public Defender's Office was not able to reach that attorney, but another attorney in the office telephoned the Cranston police and stated that she would represent respondent if the police intended to question him or place him in a lineup. Pet. App. 3-4, 49-50; Supp. Tr. 71-72, 243-244. The unidentified person who took the call told the attorney that the police were "through with [respondent] for the night." Pet. App. 4, 50; Supp. Tr. 243-244. The Public Defender did not know that respondent was a suspect in the Providence murder, and was not told

[1] "Supp. Tr." refers to the transcript of the suppression hearing conducted by the state trial court.

that Providence police officers were preparing to question respondent about the murder (Pet. App. 4, 50). All of the police officers involved in the interrogation denied receiving the telephone call (*id.* at 4, 51). Respondent neither requested an attorney nor knew of the Public Defender's offer to be available (*id.* at 4, 50).

Less than an hour after the attorney's telephone call, the Providence officers began interrogating respondent about the murder. Respondent was advised of his rights and denied any involvement in the murder. The questioning stopped and respondent was removed from the room. Several minutes later respondent called for the police and said that he wanted to make a statement. Pet. App. 4-5, 50; Supp. Tr. 152-154. He again was read the *Miranda* warnings and signed a written waiver of his rights. Pet. App. 4-5, 50; Supp. Tr. 23-31, 80-84, 155-160; see Pet. App. 94-95. The waiver form included the statement that respondent "[did] not want an attorney called or appointed * * * at this time" (*id.* at 95). Respondent then gave an inculpatory statement and signed a four page confession that itself contained an explicit waiver of the *Miranda* rights. Pet. App. 5, 50; Supp. Tr. 23-31, 80-84; see Pet. App. 96-101.[2]

Approximately 30 minutes later respondent stated that he had omitted some information from his statement. He again was read the *Miranda* warnings, signed a waiver of his rights, and made a further statement. Pet. App. 5, 50; Supp. Tr. 33-39, 85-89, 160-163; see Pet. App. 102-106. The next day, respondent waived his rights and made a third inculpa-

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[2] Respondent's testimony that the officers did not advise him of his rights and directed him to sign the waiver form (Supp. Tr. 200-205, 207-209, 211-213) was not credited (Pet. App. 116; see also *id.* at 5, 30, 50).

tory statement. Pet. App. 5-6, 50; Supp. Tr. 90-96; see Pet. App. 107-111.

2. a. Respondent moved before trial to suppress the three confessions. The trial court denied the motion (Pet. App. 112-117). It noted that respondent had received the *Miranda* warnings and signed a waiver form in connection with each of the three statements, and concluded that "when [respondent] signed those waiver forms, * * * he knowingly, intelligently, and voluntarily waived his privilege against self-incrimination. And also his right to counsel" (*id.* at 116). The court further stated that it was "satisfied that during the course of the interrogation, [respondent] was not coerced, he was not threatened, he was not promised anything in return for his statements. And the three statements that were given were in fact given voluntarily" (*ibid.*). The court stated that respondent had "an absolute constitutional right to request the presence of an attorney during the course of * * * interrogation" but found that respondent "never did in fact request the services of an attorney" (*ibid.*). It observed that the Office of the Public Defender was aware that respondent was in custody but that "it is not the right of the attorney, it is the right of the defendant to request a lawyer" (*ibid.*). Respondent subsequently was convicted of first degree murder (*id.* at 47).

b. The Supreme Court of Rhode Island affirmed respondent's conviction by a divided vote (Pet. App. 45-91), rejecting his claim that the confessions should have been suppressed because they were obtained in violation of his right to counsel and his privilege against compelled self-incrimination. The court concluded that "the principles of *Miranda* place the assertion of the right to remain silent and the right to counsel upon the accused, and not upon benign third

parties, whether or not they happen to be lawyers" (*id.* at 60), and declined to adopt a rule that the right to counsel can be waived only with the advice of counsel (*id.* at 60-63).

The court also rejected the contention that the police were required to inform respondent of the attorney's telephone call in order to obtain a knowing and intelligent waiver of respondent's rights. The court found that "[t]he evidence is overwhelming in support of the trial justice's finding that [respondent] was admonished of the right to remain silent and of his right to retained or appointed counsel. It hardly seems conceivable that the additional information that an attorney whom he did not know had called the police station would have added significantly to the quantum of information necessary for the accused to make an informed decision as to waiver" (Pet. App. 63-64).

Two justices dissented (Pet. App. 70-91). They concluded that respondent's waiver of his rights was invalid because the police did not notify him of the attorney's availability to serve as his counsel during the interrogation.

3. a. Respondent's application for a writ of habeas corpus in the United States District Court for the District of Rhode Island was denied (Pet. App. 23-43). The district court found that respondent had been advised of his constitutional rights and that he had knowingly and voluntarily waived those rights (*id.* at 36-37, 39-40). The court also found "no suggestion * * * of police brutality, or of coercion, psychological duress, illicit inducement, intimidation, or the like" (*id.* at 37). Finally, the court rejected respondent's claim that the officers' failure to inform respondent of the attorney's telephone call vitiated respondent's *Miranda* waivers. Observing that re-

spondent was aware of his right to counsel and familiar with the Office of the Public Defender by virtue of his ongoing relationship with the office, the court concluded that "the police 'were hardly withholding vital information' in failing to mention [the attorney's] call" (*id.* at 39).[3]

b. The court of appeals reversed (Pet. App. 1-22), concluding that respondent's waiver of his *Miranda* rights was not knowing or voluntary. The court rested its decision upon three factors (*id.* at 13): "the withholding from [respondent] of the fact that [the attorney] had called; the withholding of the fact that [the attorney] had been told there would be no questioning or lineup that night; and the conduct of the police." The court first found that respondent had an ongoing professional relationship with the Public Defender's Office because he was represented by that office in a pending case (*id.* at 10-11 n.3). The court stated that the police were required to provide respondent with the information concerning the telephone call because the information could have affected respondent's decision whether to waive his rights (*id.* at 14-15). It extensively reviewed the facts surrounding the failure to provide this information to respondent (*id.* at 15-19), finding that respondent was not informed because of the "deliberate or reckless irresponsibility of the person who re-

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[3] Respondent also alleged violations of his Sixth Amendment right to counsel and his Fourteenth Amendment right to due process. The district court rejected the Sixth Amendment claim (Pet. App. 33) on the basis of this Court's reaffirmation in *United States* v. *Gouveia*, No. 83-128 (May 29, 1984), slip op. 6, that "the right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant." The district court found no due process violation (Pet. App. 40-42) because the conduct of the police was not fundamentally unfair.

sponded to [the attorney's] call" (*id.* at 15). The court concluded that this combination of circumstances "clearly vitiates any claim that a waiver of counsel was knowing and voluntary" (*id.* at 20).

SUMMARY OF ARGUMENT

A. In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court held that the privilege against compelled self-incrimination applies to custodial police interrogation. *Miranda* set forth a series of "procedural safeguards"—including the well-known requirement that the police advise the suspect of his constitutional rights—designed to dispel what the Court viewed as the inherent compulsion of custodial interrogation and to permit the free exercise of the privilege.

The court of appeals concluded in this case that the warnings prescribed by *Miranda* were not adequate to provide respondent with the information he needed to determine whether to waive or assert his privilege against self-incrimination, ruling that the police should in addition have informed respondent that an attorney had telephoned the police station and offered to represent respondent during interrogation. This holding cannot logically be supported on the basis of the rights afforded by the Fifth Amendment privilege against compelled self-incrimination or the prophylactic rule established by *Miranda* to protect those rights in the context of custodial interrogation. In fact, this Court consistently has indicated that the *Miranda* procedures are sufficient to dispel the presumed coercion of custodial interrogation. The purpose of the *Miranda* warnings is to inform a suspect of his constitutional rights, and a knowing and voluntary waiver of those rights suffices to establish that a statement was not unconstitutionally coerced.

The voluntariness of respondent's *Miranda* waivers

could not have been vitiated by the failure of the police to inform respondent about the telephone call any more than it could by any other fact extrinsic to the interrogation and unknown to the suspect. Had there been no call from a lawyer, no one disputes that respondent's knowing waiver of rights would have provided entirely acceptable evidence that his statement was not impermissibly coerced. It surpasses our understanding how his otherwise voluntary election to speak could possibly have been affected by this unknown event.

The court of appeals found that the information might have affected respondent's decision whether to waive his rights; this seems to us debatable as an empirical matter, but even were it accurate it would provide no legal grounds for requiring the police to supply the information to respondent. The point of the Fifth Amendment and of *Miranda* is to ensure the voluntariness of a suspect's decision to speak, not to ensure that such a decision also comports with the suspect's informed self-interest. There is accordingly no requirement that the police, having informed the suspect of his rights, also provide all additional information that may be material to the decision whether to waive those rights. Indeed, any rule that would require the police to provide information that might discourage a voluntary statement by a suspect not only furthers no policy of the Constitution but actually undermines the important and legitimate interest of society in the prevention and solution of crimes. Moreover, the rule created by the court of appeals would undermine the clarity of the *Miranda* warnings and force police officers to make difficult and often imponderable decisions regarding the information they must provide to a suspect in order to obtain a valid *Miranda* waiver.

B. The decision of the court of appeals cannot be supported under the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment. Respondent's Sixth Amendment rights had not attached at the time of the interrogations because adversary judicial proceedings had not been commenced. Nor, if the specific relevant constitutional policy of the Self-Incrimination Clause was not infringed, is there any basis for holding that the more general fairness requirement of the Due Process Clause was violated by the failure to supply respondent with information concerning the attorney's telephone call. Given the vital societal interest in solving murders and incarcerating murderers, it can hardly be thought fundamentally unfair to withhold information simply because it might discourage the making of a voluntary statement.

ARGUMENT

RESPONDENT'S THREE VOLUNTARY STATEMENTS WERE PROPERLY ADMITTED IN EVIDENCE

The investigating officers in this case followed with precision the procedure set forth by this Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). They recited the prescribed warnings, sought to ensure that respondent understood his rights, and obtained express written waivers of those rights before each of respondent's three statements detailing his slaying of Mary Jo Hickey. The court of appeals decided that this painstaking compliance with *Miranda* was not sufficient to permit the introduction of those statements into evidence. It concluded that the failure of the police to tell respondent that an attorney had telephoned and offered to serve as respondent's counsel during interrogation vitiated the voluntariness of re-

spondent's *Miranda* waivers and required the suppression of the confessions.[4]

In our view, the result reached by the court of appeals is wholly unsupported by the policies of the privilege against compelled self-incrimination and is contrary to this Court's decisions in *Miranda* and its progeny. It similarly cannot be justified by reference to the Sixth Amendment or the Due Process Clause's protection of fundamental fairness. Rather than securing these constitutional rights, the court of appeals' decision has unjustifiably altered the existing balance between society's compelling interest in effective law enforcement and the citizen's undeniable right to be free from coerced self-incrimination, and has done so in a manner that is likely only to disrupt the procedures adopted pursuant to *Miranda* and inject new confusion and uncertainty into the interrogation process.[5]

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[4] Several state courts have reached the same result. See *Weber* v. *State*, 457 A.2d 674 (Del. 1983); *Commonwealth* v. *Sherman*, 389 Mass. 287, 450 N.E.2d 566 (1983); *People* v. *Smith*, 93 Ill.2d 179, 442 N.E.2d 1325 (1982); *State* v. *Haynes*, 288 Or. 59, 602 P.2d 272 (1979), cert. denied, 446 U.S. 945 (1980); *Commonwealth* v. *Hilliard*, 471 Pa. 318, 370 A.2d 322 (1977); *State* v. *Jones*, 19 Wash.App. 850, 578 P.2d 71 (1978); *State* v. *Jackson*, 303 So.2d 734 (La. 1974). The Georgia Supreme Court recently rejected this position and adopted the holding of the Rhode Island Supreme Court in the present case that a suspect need not be informed of an attorney's inquiry. *Blanks* v. *State*, No. 41673 (Ga. June 10, 1985), summarized at 37 Crim. L. Rep. (BNA) 2249 (July 3, 1985); see also *State* v. *Beck*, 687 S.W.2d 155 (Mo. 1985).

[5] The Providence officers questioned respondent about the murder after he had refused to sign a waiver of his *Miranda* rights in connection with the investigation by the Cranston police of the breaking and entering charge on which respondent had been arrested. It is not contended that respondent's Fifth Amendment rights were violated because he was inter-

A. The Police Were Not Required To Inform Respondent Of The Attorney's Unsolicited Offer Of Legal Representation In Order To Obtain An Effective Waiver Of Respondent's *Miranda* Rights

This case does not concern an actual violation of the privilege against compelled self-incrimination guaranteed by the Fifth Amendment; "[t]he constitutional guarantee is only that the witness be not *compelled* to give self-incriminating testimony. The test is whether, considering the totality of the circumstances, the free will of the witness was overborne." *United States* v. *Washington*, 431 U.S. 181, 188 (1977) (emphasis in original). Respondent was surely not compelled to confess; the Rhode Island state courts and the federal district court specifically found that respondent's three confessions were voluntary (see Pet. App. 116, 67, 37), and the court of appeals did not overturn those findings.[6]

The issue here is the scope of the "procedural safeguards" prescribed by this Court in *Miranda* v. *Arizona*; specifically, whether the court of appeals correctly held that the police must supplement the warnings enumerated in *Miranda* with certain additional information, varying on the basis of the factual circumstances of each particular case, before the suspect can effectively waive his rights. We submit that the scope of the obligation to supply information to a suspect must be defined by reference to the purpose of the privilege against self-incrimination and of

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rogated about the murder after he had declined to sign a waiver form in connection with questioning about his more recent offense. See *Michigan* v. *Mosley*, 423 U.S. 96 (1975).

[6] The court of appeals acknowledged that "[t]his is not the kind of Fifth Amendment case in which direct physical or psychological pressure from the police is claimed to have overborne the will of a suspect" (Pet. App. 12).

Miranda's procedural safeguards—an inquiry completely ignored by the court of appeals. The rule adopted by the court of appeals fails when measured against this standard.

1. a. The Court in *Miranda* concluded that permitting a suspect to assert the privilege against self-incrimination during custodial interrogation was not by itself sufficient to safeguard the interests protected by the privilege. It found that the privilege was threatened by the "inherently compelling pressures [of in-custody interrogation] which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely" (384 U.S. at 467). The Court held that in order "to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored" (*ibid.*). *Miranda* prescribed "procedural safeguards" designed to accomplish this end (*id.* at 444-445):

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.

These safeguards are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected." *Michigan* v. *Tucker*, 417 U.S. 433, 444 (1974); see also *Oregon* v. *Elstad*, No. 83-773 (Mar. 4, 1985) slip op. 6; *New York* v. *Quarles*, No. 82-1213 (June 12, 1984), slip op. 4-5. Thus, the failure to administer the *Miranda* warnings raises a presumption of compulsion that requires the suppression of any subsequent statement by the unwarned suspect. *Oregon* v. *Elstad*, slip op. 6; *New York* v. *Quarles*, slip op. 5 n.5.

The premise of this Court's decision in *Miranda* is that the compulsion the Court presumed to be inherent in custodial interrogation would be dispelled—and the privilege against self-incrimination therefore fully protected—if a suspect received the warnings and, being fully cognizant of his rights, voluntarily elected to waive them. The *Miranda* Court itself stated that the warnings and other procedures were "safeguards *effective* to secure the privilege against self-incrimination." 384 U.S. at 444 (emphasis added); see also *id.* at 467, 479. Nowhere in the Court's comprehensive discussion of the warnings (*id.* at 467-474) is there even a hint that the police would be required to append ad hoc supplements to the warnings depending on the facts of each particular case.

Moreover, subsequent decisions have made clear that *Miranda* sets forth all of the procedures necessary to protect the Fifth Amendment privilege in the context of police interrogations. For example, in *Fare* v. *Michael C.*, 442 U.S. 707, 718 (1979), the Court observed that "*Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial

interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible." See also *Michigan* v. *Mosley*, 423 U.S. 96, 99-100 (1975); *Michigan* v. *Tucker*, 417 U.S. at 443-444; cf. *Oregon* v. *Elstad*, slip op. 15 ("[a] subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement").

This Court's decision in *United States* v. *Washington*, *supra*, confirms the conclusion that the warnings accurately and sufficiently inform suspects of their rights. The defendant in *Washington* received the *Miranda* warnings prior to testifying before a grand jury, but asserted that he also should have been told that he was a potential defendant. The Court rejected the claim that the *Miranda* warnings were inadequate to protect the defendant's Fifth Amendment right (431 U.S. at 188):

> It is inconceivable that such a warning would fail to alert [a defendant] to his right to refuse to answer any question which might incriminate him. This advice also eliminated any possible compulsion to self-incrimination which might otherwise exist. To suggest otherwise is to ignore the record and reality. Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled.

The Court observed that "[e]ven in the presumed psychologically coercive atmosphere of police custodial interrogation, *Miranda* does not require that any additional warnings be given simply because the suspect is a potential defendant" (*ibid.*). Thus, it seems

settled that it is generally unnecessary to add to the warnings in order to safeguard the rights protected by *Miranda*.[7]

Prior to each of his three confessions respondent was told that he had a right to remain silent, that his statements could be used against him, that he had a right to have an attorney present during questioning by the police, and that if he could not afford an attorney one would be appointed prior to questioning (Pet. App. 94-95, 102-103, 107-108). These warnings indisputably satisfied *Miranda*'s requirement that respondent be informed of his rights.[8]

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[7] The courts of appeals have rejected arguments that the *Miranda* warnings should have been supplemented in a particular case. See *United States* v. *Hall*, 724 F.2d 1055, 1059 (2d Cir. 1983); *United States* v. *Contreras*, 667 F.2d 976, 979 (11th Cir.), cert. denied, 459 U.S. 849 (1982); *Harris* v. *Riddle*, 551 F.2d 936, 938-939 (4th Cir.), cert. denied, 434 U.S. 849 (1977); *United States ex rel. Placek* v. *Illinois*, 546 F.2d 1298, 1300 (7th Cir. 1976); cf. *United States* v. *Brown*, 569 F.2d 236, 239 (5th Cir. 1978) (en banc).

Some courts have indicated that the police might be required to inform the suspect of the crime that is the subject of the questioning. *United States* v. *McCrary*, 643 F.2d 323, 328 (5th Cir. 1981 (dictum); see also *Carter* v. *Garrison*, 656 F.2d 68, 70 (4th Cir. 1981), cert. denied, 455 U.S. 952 (1982). However, there appears to be no justification for this position because this information is not needed to inform the suspect of his rights. Moreover, "[w]hen the questioning points in the direction of illegal conduct, the person being interrogated may * * * refuse to answer" (*United States* v. *Burger*, 728 F.2d 140, 141 (2d Cir. 1984)).

[8] Indeed, it is not even clear that *Miranda* has any application to this case. Respondent's statements were not the product of police-initiated interrogation at all; rather, respondent volunteered his confessions by banging on the door of the holding room and telling the officers that he wished to make a statement (Pet. App. 5). Since the confessions did not result

It is wholly illogical to suggest that, because of the particular facts of the case, the traditional warnings were not sufficient to eliminate the presumed coercive effect of police custody. The only fact that even arguably distinguishes the present case from a typical interrogation is the attorney's telephone inquiry. However, respondent was not aware of the inquiry; its existence therefore could not in any manner increase the level of compulsion that he felt during the interrogation. Since respondent could not by his ignorance of the phone call have been subject to greater compulsion than that presumed to be associated with a typical interrogation, no additional warnings were needed to fulfill *Miranda*'s goal of enabling respondent to exercise freely his privilege against compelled self-incrimination.

b. *Miranda* recognized that a defendant may waive his right to remain silent and his right to have an attorney present during police questioning: "[t]he defendant may waive effectuation of [the] rights provided the waiver is made voluntarily, knowingly and intelligently" (384 U.S. at 444). The validity of such a waiver is evaluated "upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel" (*Fare* v. *Michael C.*, 442 U.S. at 725). The relevant circumstances include "the [defendant's] age, experience, education, background, and intelli-

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from an attempt by the officers to elicit incriminating statements, they were not the product of an "interrogation" and *Miranda* does not apply. See *Rhode Island* v. *Innis*, 446 U.S. 291 (1980). Significantly, respondent's statements would have been admissible even if he had previously invoked his right to counsel. See *Oregon* v. *Bradshaw*, 462 U.S. 1039 (1983).

gence, and * * * whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Ibid.*; see also *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1046 (1983) (plurality opinion); *Edwards* v. *Arizona*, 451 U.S. 477, 482 (1981); *North Carolina* v. *Butler*, 441 U.S. 369, 374-475 (1979).[9] Thus, the waiver inquiry essentially is a corollary of *Miranda*'s warnings requirement; it seeks to ascertain whether the suspect understood his rights and was able to choose freely whether to assert those rights.

The court of appeals concluded (Pet. App. 13, 20-21) that respondent's waivers of his Fifth Amendment rights were not voluntary because the police did not inform respondent that the attorney had telephoned and volunteered to represent respondent during interrogation and that the attorney had been told that no questioning would occur that evening. However, the court of appeals never explained how those facts could possibly bear on respondent's ability to understand either the rights discussed in the *Miranda* warnings or his privilege against self-incrimination. Unless the information in question was necessary to explain the Fifth Amendment rights to respondent, the failure to provide the information could not affect respondent's *Miranda* waivers. Any other rule would "cut this Court's holding in [*Miranda*] completely loose from its own explicitly stated rationale." *Beckwith* v. *United States*, 425 U.S. 341, 345 (1976).[10]

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[9] The prosecution bears the burden of demonstrating the voluntariness of the waiver. *Butler*, 441 U.S. at 373; *Miranda*, 384 U.S. at 475.

[10] The court of appeals intimated (Pet. App. 15) that the information about the attorney's telephone call might have

2. The court of appeals held that the significance of the information concerning the attorney's telephone call was that it might have influenced respondent's decision whether to request the presence of counsel (Pet. App. 14-15). The assumption that underlies this conclusion—that a suspect must be provided with all information relevant to his decision whether to waive his rights—cannot be supported by reference to the privilege against compelled self-incrimination, is fundamentally at odds with this Court's decision in *Miranda*, and erects wholly unjustified obstacles to legitimate and effective law enforcement efforts.

The decision in *Miranda* struck a balance between the two important interests implicated in police interrogation—society's interest in effective law enforcement and the suspect's privilege against self-incrimination. See *New York* v. *Quarles*, slip op. 7. The Court consistently has affirmed the "need for police questioning as a tool for the effective enforce-

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made the right to counsel appear more concrete. If the court were correct that some such statement was needed to ensure true understanding of the right to counsel, it is not clear why a suspect should not have to be so advised in all cases, whether or not any call had actually been made. In any event, there is little basis in the circumstances of this case for the court's assumption that the information would in fact have been material to respondent's waiver decision. Respondent was well situated to understand these warnings because he previously had been involved in the criminal justice system (cf. *Fare* v. *Michael C.*, 442 U.S. at 725-726). Indeed, respondent at the time was represented by an appointed attorney on a pending charge in another case and therefore could not have had any difficulty understanding the concept of assistance of appointed counsel. See Pet. App. 63-64 (opinion of the Rhode Island Supreme Court); cf. *United States* v. *Brown*, 569 F.2d at 239 (waiver of Sixth Amendment right to counsel).

ment of criminal laws. Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973) (citation omitted); see also *Haynes* v. *Washington*, 373 U.S. 503, 515 (1963); *Watts* v. *Indiana*, 338 U.S. 49, 61 (1949) (Jackson, J., concurring).[11]

Miranda's holding that the Fifth Amendment privilege against compelled self-incrimination applies in the context of custodial interrogation by law enforcement officers did not bar all police interrogation, or even reflect a preference against such questioning, because "the [Fifth] Amendment does not automatically preclude self-incrimination, whether spontaneous or in response to questions put by government officials" (*United States* v. *Washington*, 431 U.S. at 186). Indeed, "far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable. * * * Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damn-

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[11] Justice Frankfurter observed that police questioning "is often indispensable to crime detection" because

> [d]espite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses, nothing remains—if police investigation is not to be balked before it has fairly begun—but to seek out possibly guilty witnesses and ask them questions, witnesses, that is, who are suspected of knowing something about the offense precisely because they are suspected of implication in it.

Culombe v. *Connecticut*, 367 U.S. 568, 571 (1961) (opinion of Frankfurter, J.); see also *id.* at 576, 578-580.

ing admissions." *Id.* at 187; see also *Oregon* v. *Elstad*, slip op. 6. As Justice Frankfurter noted, "a confession made by a person in custody is not always the result of an overborne will. The police may be midwife to a declaration naturally born of remorse, or relief, or desperation, or calculation." *Culombe* v. *Connecticut*, 367 U.S. 568, 576 (1961) (opinion of Frankfurter, J.).[12]

Thus, the goal of *Miranda* (and of the Fifth Amendment itself) is neither to encourage nor discourage a suspect from responding to questions posed by the police. It is to ensure that the suspect is aware that he is free to agree to interrogation or remain silent: "Once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities." *Oregon* v. *Elstad*, slip op. 10; see also *id.* at 12 ("[t]he warning conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an 'act of free will' "); *Michigan* v. *Mosley*, 423 U.S. at 108-109 (White, J., concurring).

A requirement that the police provide suspects with all information relevant to the waiver decision, even though such information is not needed to inform the suspect of his rights, cannot remotely be justified as a measure to protect the suspect's privilege against compelled self-incrimination. It seems clear to us that the court of appeals simply lost sight of the purposes of the Fifth Amendment privilege and instead predicated its holding on the effect of the non-disclosure on respondent's ability to act in his own enlightened self-interest. But its ruling, in

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[12] The circumstances surrounding respondent's statements (see Pet. App. 5) suggest that this is precisely what happened here.

addition to lacking constitutional moorings, would fundamentally alter the balance struck in *Miranda* between the rights of the suspect and society's interest in law enforcement by requiring the police in effect to discourage a suspect from making a voluntary statement. There is no justification for imposing restrictions upon law enforcement efforts where those restrictions are not necessary to safeguard constitutional rights. In *Oregon* v. *Elstad*, *supra*, this Court rejected the defendant's claim that his *Miranda* waiver was not fully informed because he had not received an additional warning telling him that his previous confession was inadmissible. The Court stated that an additional warning was "neither practicable nor constitutionally necessary," and noted that it "has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness" (slip op. 17).[13]

Similarly, respondent's waivers here were voluntary even though he was not aware of facts that might have affected his decision whether to assert his right to counsel. Respondent had been informed repeatedly that he had a right to the presence of counsel during questioning and he indicated that he understood that right. Respondent could have invoked this right at any time simply by requesting an attorney, but decided not to do so. That free choice is all that *Miranda* requires.[14]

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[13] The defendant in *Elstad* could at least argue that his statements were the product of an initial presumptively coerced statement, thus making the policies of the Fifth Amendment potentially relevant to his case. Here, respondent cannot even make such a threshold showing.

[14] *Miranda* assumes that a properly warned suspect is capable of deciding for himself whether to request assistance of counsel. A fortuitous inquiry by an attorney provides no justifica-

A rule requiring the police to supply a suspect with information because the information might influence the suspect's waiver decision could sweep quite broadly. For example, the suspect's decision to waive his rights and consent to interrogation probably would be affected by the quality and quantity of information already possessed by the police concerning the suspect's involvement in the offense under investigation, the likely penalties for the crime of which he is suspected, and the prosecutor's or judge's propensity to treat more leniently one who has cooperated in the investigation. In addition, police officers surely are aware that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances" (*Watts* v. *Indiana*, 338 U.S. at 59 (Jackson, J., concurring in the judgment)), and that fact also would most likely influence a suspect's decision. Under the test applied by the court of appeals, the police could be burdened with the requirement of supplying suspects with such information despite the fact that the information is irrelevant to the purpose of *Miranda* —to eliminate the compulsion presumed to be inherent in custodial interrogation and enable a suspect freely to decide whether to exercise his right to re-

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tion for altering this assumption. See Kamisar, "Brewer v. Williams, Massiah *and* Miranda: *What is 'Interrogation'? When Does It Matter?*," 67 Geo. L.J. 1, 95 (1978). Indeed, the court of appeals' rule seems to us rather arbitrary and somewhat unfair to the indigent and unrepresented suspect, who would be far less likely to be the beneficiary of a call from a solicitous attorney. As the Rhode Island Supreme Court stated: "The next logical step would be to ban confessions altogether on the theory that a person should not be denied his right to counsel on the fortuitous circumstance that someone might not see fit to call the station" (Pet. App. 65).

main silent. Thus, such additional warnings would "come[] at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being *compelled* to testify against himself." *Oregon* v. *Elstad*, slip op. 13 (emphasis in original).[15]

Even if the courts were somehow possessed of a general charter to strike a policy-based balance between the self-interest of the suspect and the law enforcement interests of society, it would be unwise and improvident to adopt the court of appeals' rule. As the Rhode Island Supreme Court observed (Pet. App. 64-65):

> We fear that if such a rule were adopted, there would be nothing to prevent or discourage the office of the public defender or other defense counsel who represent a large number of recidivistic clients from sending to the various police departments throughout the state the names of these clients, together with a request that these attorneys be notified in the event that such individuals are arrested for criminal conduct. Under such a rule, the failure of the police, whether by administrative inadequacy or otherwise, to effectuate such a notification would then be fatal to the admissibility of any statements thereafter obtained. As the crime rate increases and as organized society seems ever more impotent to deal with crime on our streets, in our neighborhoods,

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[15] The Court stated in *Miranda* that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege" (384 U.S. at 476), but the fact that the police failed to supply respondent with information they were not required to provide obviously does not constitute a "trick" under this standard.

and in our homes, this addition to the *Miranda* requirements seems as unwise on policy grounds as it is unnecessary on constitutional grounds.

3. Practical considerations also counsel against any additions to the information that must be supplied to a suspect in order to obtain an effective *Miranda* waiver. One of the perceived virtues of *Miranda* is that it supplies a "bright line" rule for the conduct of custodial interrogation. As the Chief Justice has explained, "[t]he meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures." *Rhode Island* v. *Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring); see also *New York* v. *Quarles*, slip op. 3-4 (O'Connor, J., concurring in the judgment in part and dissenting in part); *Berkemer* v. *McCarty*, No. 83-710 (July 2, 1984), slip op. 8-10; *Fare* v. *Michael C.*, 442 U.S. at 718.

The court of appeals' approach would introduce a new element of uncertainty into the interrogation process. Police officers could no longer be sure that careful administration of the warnings would provide the predicate for a valid waiver. Instead, they would have to examine the facts of each case to determine whether a court might later conclude that some piece of information would have been relevant to the suspect's decision. And a miscalculation in either direction would prove costly: if they err in failing to supply the information, any confession they obtain would have to be suppressed; if they err on the side of caution, their action may needlessly discourage the making of a statement and thwart successful investigation of a serious crime.

The First Circuit itself has illustrated the complexity of this determination. In *Fuentes* v. *Moran*, 733

F.2d 176 (1st Cir. 1984), the court concluded that the failure to inform the defendant of an attorney's "half-hearted inquiry as to the [the defendant's] status" did not vitiate the defendant's *Miranda* waiver (*id.* at 181). In the present case, the court of appeals distinguished *Fuentes* on the ground that the attorney here "could not be criticized for lack of diligence" (Pet. App. 13). It is likely to be extremely difficult, if not impossible, for police to make these fine distinctions in the context of an ongoing investigation. The court below also relied upon respondent's preexisting relationship with the Office of the Public Defender (*id.* at 10-11 n.3), a circumstance not likely to be known to investigating officers. Finally, the police officers actually conducting the investigation in this case were not even aware of the attorney's inquiry. Thus, even if they had known of the court of appeals' rule requiring that such information be supplied to suspects, they would not have been able to avoid suppression of the confessions in this case.[16]

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[16] Respondent will no doubt argue that it was the duty of the officer who took the attorney's call to convey the information to the interrogating officers, even though there is no indication in the record that he was aware of the arrival of the Providence officers in connection with the murder investigation. Perhaps the recognition of a duty to inform makes sense where the suspect has invoked his right of silence or to counsel—since in those circumstances renewal of interrogation may tend to undermine the effectiveness of the advice of rights and call in question the validity of an ensuing waiver—but it seems to us largely unworkable in the case of extrinsic information of the sort involved here. When a suspect invokes his constitutional rights, the officers are on notice that they have received an important piece of information that should be conveyed to their colleagues. The officer receiving the telephone call in the present case would not have been aware of the alleged significance of his exchange with the attorney.

The rule adopted by the court below is squarely contrary to this Court's recognition of "the importance of a workable rule 'to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" *New York* v. *Quarles*, slip op. 9, quoting *Dunaway* v. *New York*, 442 U.S. 200, 213-214 (1979); see also *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1050 n.3 (Powell, J., concurring in the judgment). It supplies no workable standards for law enforcement agents and would create an entire new area of post hoc judicial inquiry without providing any necessary protection for constitutional rights.

B. Neither The Sixth Amendment Nor Respondent's Right To Due Process Obligated The Police To Inform Respondent Of The Attorney's Telephone Call

The court of appeals rested its decision on the Self-Incrimination Clause of the Fifth Amendment and did not reach respondent's claims that the failure to inform him of the attorney's telephone call violated his rights under the Sixth and Fourteenth Amendments (see Pet. App. 21 n.5). Respondent may argue that the decision below should be upheld on these grounds, but neither of these theories supports the result reached by the court of appeals.

1. Any effort by respondent to rely upon the Sixth Amendment to support the rule adopted by the court below is foreclosed by decisions of this Court. The Court recently emphasized that "the right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant." *United States* v. *Gouveia*, No. 83-128 (May 29, 1984), slip op. 6; see also *Estelle* v. *Smith*, 451 U.S. 454, 469-

470 (1981); *Kirby* v. *Illinois*, 406 U.S. 682, 688-689 (1972) (plurality opinion). Since adversary proceedings plainly had not commenced at the time of the interrogation in this case, respondent's right to counsel had not yet attached. That right therefore cannot support the additional advice required by the court of appeals.[17]

2. The police failure to inform respondent of the attorney's telephone call plainly did not deprive respondent of the fundamental fairness guaranteed by the Due Process Clause of the Fourteenth Amendment. Although possessing substantial grounds for suspecting that respondent had committed a most serious crime, the officers nevertheless scrupulously respected respondent's Fifth Amendment rights, and respondent freely waived his right to the assistance of counsel during interrogation. Given society's compelling interest in the prevention and solution of crime and the importance that voluntary admissions by suspects play in the accomplishment of that objective, it seems to us impossible to say that fundamental fairness requires the police to convey this sort of information to a suspect simply on the ground that it is likely to discourage voluntary statements that

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[17] The Court in *Miranda* stated that preventing an attorney from consulting with his client during interrogation constituted a Sixth Amendment violation (384 U.S. at 465-466 n.35), but the Court has since made clear that *Miranda*—and *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), upon which *Miranda* relied—discussed a right to counsel during interrogation "in order to protect the Fifth Amendment privilege against self-incrimination rather than to vindicate the Sixth Amendment right to counsel." *United States* v. *Gouveia*, slip op. 7 n.5. As discussed above, the court of appeals' decision cannot be supported on Fifth Amendment grounds.

the suspect may later regret having made. Compare *North Carolina* v. *Pearce*, 395 U.S. 711, 723-726 (1969); *Rochin* v. *California*, 342 U.S. 165 (1952).

Indeed, this Court previously has indicated that a due process claim adds nothing to a defendant's assertion of a *Miranda* violation. In *United States* v. *Washington*, *supra*, the defendant argued that it would be "fundamentally unfair to elicit incriminating testimony from a potential defendant without first informing him of his target status" because this additional information would "alert the witness more pointedly" and assist him in deciding whether to invoke his privilege against compelled self-incrimination (431 U.S. at 190 n.6). The Court held that "[t]his line of argument simply restates respondent's claims under the Self-Incrimination Clause and is rejected for the same reasons," noting that there had been no showing of "any governmental misconduct which undermined the fairness of the proceedings" (*ibid.*). The same result is appropriate here. The fairness of a police interrogation under the Due Process Clause is measured by "examining the circumstances of interrogation to determine whether the processes were so unfair or unreasonable as to render a subsequent confession involuntary." *Michigan* v. *Tucker*, 417 U.S. at 441; see also *Oregon* v. *Elstad*, slip op. 5; *Haynes* v. *Washington*, *supra*. Respondent obviously cannot argue that because the police failed to inform him of the attorney's telephone call his confessions were involuntary under this standard. Therefore, the admission of the confessions into evidence did not violate the Due Process Clause's guarantee of fundamental fairness.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

ANDREW J. PINCUS
Assistant to the Solicitor General

SARA CRISCITELLI
Attorney

JULY 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10259